

**Paul Lundberg  
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February 22, 2011

**BY HAND DELIVERY**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
The Portals  
445 12th Street, SW  
Office of the Secretary, Room TW B204  
Washington DC 20554

**Re:   *All American, et al., v. AT&T Corp.*, File No. EB-10-MD-003**

Dear Ms. Dortch:

On behalf of Aventure Communication Technology, L.L.C., enclosed please find an original and four copies of the Petition for Reconsideration or Clarification of Aventure Communications Technology, L.L.C. Please stamp and return the enclosed extra copy. Please direct any questions or communications regarding this matter to the undersigned.

Sincerely,

/s/ Paul Lundberg /s/

Paul Lundberg  
Counsel for Aventure Communications Technology, L.L.C.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )

ALL AMERICAN TELEPHONE CO., INC., )  
e-PINNACLE COMMUNICATIONS, INC., and )  
CHASECOM )

Complainants, )

v. )

AT&T CORP. )

Defendants. )  
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File No. EB-10-MD-003

**PETITION FOR RECONSIDERATION OR CLARIFICATION  
OF ADVENTURE COMMUNICATION TECHNOLOGY, L.L.C.**

Adventure Communication Technology, L.L.C. (“Adventure”) by its undersigned counsel and pursuant to Commission Rule 1.106<sup>1</sup> hereby submits this Petition for Reconsideration or Clarification of the Commission’s January 20, 2011 Memorandum Opinion and Order (“*All American Order*”) in the above-captioned proceeding.

Adventure is an Iowa corporation that provides the full range of local and long-distance telephone services to business and residential customers in rural communities in Iowa. For the past three years, Adventure has been one of many rural local exchange carriers (LECs) embroiled in litigation in federal district court in Iowa related to interexchange carriers’ (IXCs) refusals to provide payment for the access services they have been taking from the LECs. In both collection actions and in counterclaims, Adventure alleges, among

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<sup>1</sup> 47 C.F.R. § 1.106.

other things, that the IXCs violate several provisions of the Communications Act by engaging in self-help refusals to pay invoiced access charges.

One of the IXCs against whom Aventure is litigating – Qwest Communications Corp. – recently sent correspondence to Aventure and numerous other LEC litigants in the Iowa federal court cases. That correspondence focuses on the newly-released *All American Order*, and asserts that the *Order* establishes new precedent confirming that LECs victimized by self-help cannot assert claims based on the argument that self-help violates the Communications Act, either before the FCC, or before federal courts. Qwest’s correspondence to Aventure and other LECs demands that we voluntarily withdraw all Communications Act claims from the pending federal court litigation, in light of the *All American Order*, or Qwest will move the court to dismiss those claims with prejudice.<sup>2</sup> A copy of that correspondence is appended at Attachment 1.

Aventure has reviewed the *All American Order*, and finds the *Order* vague and confusing. Even though the *Order* was issued in a carrier-specific formal complaint proceeding, it contains broadly worded statements that appear to go well beyond the limits of party-specific adjudication. However, the *Order*, as written, is vague as to whether some of its statements are dicta, or new and broad pronouncements of *per se* rules of law. Aventure certainly disagrees that the *Order* has the significance and precedential impact that Qwest ascribes to it. However, because of the *Order*’s inherent vagueness, Aventure believes it is incumbent upon the Commission to clarify its intention, to specify the legal holdings of the *All American Order*, and most importantly, to clearly state the precedential significance of the *Order*.

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<sup>2</sup> See Email from Charles Steese, counsel for Qwest Communications Corp. dated Jan. 24, 2011.

Pursuant to Commission Rule 1.106(b)(1), any entity “whose interests are adversely affected by any action taken by the Commission . . . may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person’s interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.”<sup>3</sup>

First, Aventure is adversely affected by the *All American Order*. As noted above, the *Order* is inherently vague, and so the question of whether it constitutes new and controlling precedent in Aventure’s pending federal court litigation is not clear from the face of the *Order*. Moreover, as the Qwest correspondence demonstrates, the *Order* is sufficiently vague that it is subject to multiple interpretations. It is apparent that Aventure will need to incur additional legal fees to brief the Iowa courts on the significance of the *Order* to Aventure’s cases, and to oppose motions by Qwest to dismiss some of Aventure’s claims with prejudice. Because this additional expense is necessitated solely by the inherent vagueness of the *All American Order*, it is beyond dispute that Aventure’s interests are adversely affected by that *Order*.

Second, Aventure had no notice or opportunity to participate in the proceeding that ultimately led to the issuance of the *All American Order*. Upon information and belief, the above-referenced proceeding was a party-specific adjudication which was assigned a “restricted” status by the Commission. As a “restricted” proceeding, Aventure was neither given notice of the scope of the proceeding nor an opportunity to participate in the action. Accordingly, Aventure satisfies the requirements of Rule 1.106(b) of being unable to participate in the earlier stages of the proceeding.

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<sup>3</sup> 47 C.F.R. § 1.106(b)(1).

Aventure is confident that the *All American Order* does not constitute adverse precedent for any of Aventure's federal court claims or counterclaims. Indeed, the "Self-Help" line of cases cited in the *Order*<sup>4</sup> make it absolutely clear that carriers victimized by self-help refusal to pay tariffed charges may maintain claims that such an action is an "unreasonable practice" in violation of section 201(b) of the Communications Act, and results in unreasonable rates in violation of section 203(c) of the Act. Moreover, Aventure believes that the *Order* can have no precedential value outside the party-specific formal complaint proceeding under which it is captioned, because neither Aventure nor any other carrier was provided notice and an opportunity to be heard on matters under consideration by the Commission that would directly affect us.

Nevertheless, because Qwest has stated its intention to attempt to use the *All American Order* as dispositive precedent in Aventure's pending litigation, it is incumbent upon the Commission to clarify or reconsider its *Order*. Specifically, the Commission should clarify that the *Order* does not invalidate any existing precedent and does not create a new rule of law that has effect outside of the carrier-specific adjudicatory proceeding in File No. EB-10-MD-003. If, on the contrary, the Commission does intend for the *All American Order* to establish new law and have broad application, Aventure asks that the Commission reverse the *Order* on reconsideration. Because such a finding would invalidate long-established precedent upon which Aventure and the rest of the industry have relied without explanation or justification, the *Order* is subject to reversal on reconsideration, or vacature on review. Similarly, because parties such as Aventure were provided no notice or

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<sup>4</sup> *All American Order* at notes 38-41, citing "Self-Help" cases cited by All American Tel. Co. and the other complainants, and additional cases in the "Self-Help" line of case law.

opportunity to be heard on a matter that directly affects them, the *Order* is fatally procedurally flawed.

For the reasons discussed above, the Commission should either clarify or reconsider its decision in the *All American Order*.

Respectfully submitted,

/s/ Paul Lundberg /s/  
Paul Lundberg  
Attorney at Law  
906 Terra Centre  
Sioux City, IA 51101  
712-234-3030

***Counsel to Aventure Communication  
Technology, L.L.C.***

Dated: February 22, 2011

## **ATTACHMENT 1**

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**From:** Chuck Steese [csteese@s-elaw.com]  
**Sent:** Monday, January 24, 2011 3:12 PM  
**To:** 'Chuck Steese'; 'Maureen Rahrle'; 'Anthony Osborn'; 'Brendan McMurrer'; 'Bret Dublinske'; 'Brian McAleenan'; 'Bruce Beckner'; 'Christopher Coulston'; 'Christopher Jannes'; 'David Lawson'; 'David Phipps'; 'David Sather'; 'Duane Pozza'; 'Edward Remsburg'; 'Enrico C. Soriano'; 'Carter, David'; 'Gary Joye'; 'George Thomson'; 'Ivan Webber'; 'James Bendernagel'; 'James Gilliam'; 'James Troup'; 'James Wainwright'; 'Jeana Goosmann'; 'Jennifer Bagg'; 'Jeremy Cross'; 'John Fatino'; 'Canis, Jonathan'; 'Joshua Simon'; 'Katherine Leigh McDaniel'; 'Kris Holub Tilley'; 'Lawrence McLellan'; 'Marc Goldman'; 'Mark O'Connor'; 'Mary Ellen Hassell'; 'Maxwell Blecher'; 'Hazzard, Michael'; 'Michael Hunseder'; 'Mike Jacobs'; 'Monica Colella'; 'Paul Lundberg'; 'Phillip Stoffregen'; 'Rachel Rowley'; 'Richard Lozier'; 'Robert Holz'; 'Buntrock, Ross'; 'Sandy Potter'; 'Joyce, Stephanie'; 'Steve Nelson'; 'Thomas Fisher'; 'Thomas Walton'; 'Tony Lee'  
**Subject:** New Cases Mandating Dismissal of Certain Defendants' Counterclaims  
**Attachments:** Westlaw\_Document\_11\_33\_38.doc

Counsel:

Last week, the FCC issued a decision in *All American Telephone Co. et al. v. AT&T*, 2011 WL 194539 (F.C.C.) (Jan. 20, 2011), a traffic pumping case. A copy of the decision is attached to this email. In that decision, the FCC specifically held that that Communications Act claims are limited to claims by a customer against the carrier who provided it with service:

During the past twenty years, the Commission has repeatedly held that an allegation by a carrier that a customer has failed to pay charges specified in the carrier's tariff fails to state a claim for violation of any provision of the Act, including sections 201(b) and 203(c) -- even if the carrier's customer is another carrier. These holdings stem from the fact that the Act generally governs a carrier's obligations to its customers, and not vice versa. Thus, although a customer-carrier's failure to pay another carrier's tariffed charges may give rise to a claim in court for breach of tariff/contract, it does not give rise to a claim at the Commission under section 208 (or in court under section 206) for breach of the Act itself.

*Id.* at ¶10. As a result, the Court held that the traffic pumping parties could not maintain Communications Act claims against the long distance carriers for withholding payment:

In sum, all three of the CLECs' claims rest on the assertion that AT&T's failure to pay their tariffed access charges violates section 201(b) and/or section 203(c) of the Act. That assertion is erroneous. The law is settled that a carrier-customer's failure to pay tariffed access charges does not violate either section 201(b) or section 203(c) of the Act. Accordingly, all three of All-American's claims must be denied for failure to state a claim cognizable under section 208 (or any other provision) of the Act.

*Id.* at ¶16.



Several of the LEC and FCSC Defendants have brought claims against Qwest under Sections 201(b), 202 or 203(c) of the Communications Act. These claims cannot stand in light of the *All American* decision. As a result, Qwest requests that the following parties dismiss the following claims/counterclaims:

<b>Defendant/Counterclaimant</b>	<b>Claims</b>
Dixon, Interstate 35 and Farmers and Merchants	Counts III (Section 201(b)) and IV (Section 202(a))
Great Lakes/Superior	Counts II (Section 201(b)), III (Section 202(a)), IV (Section 203) and each paragraph of Prayer for Relief that refers to sections of the Communications Act
Aventure	¶¶ 18, 20 of Count II and ¶24 of Count III as well as the requests for attorneys' fees under Section 206
Free Conferencing Corporation	Counts II (Section 201(b)), III (Section 202(a)), and each paragraph of Prayer for Relief that refers to sections of the Communications Act and the request for attorneys fees
Global Conference Partners	Counts II (Section 201(b)), III (Section 202(a)) and V (declaratory relief) to the extent it refers to Sections 201 or 202
Futurephone	Counts I (Section 201(a)), II (Section 201(b)), III (Section 203(c)), IV (Section 202(a)), request for relief for attorneys fees under the Communications Act

If you do not voluntarily move to withdraw these claims, Qwest plans to move to dismiss in approximately two weeks. If forced to file a motion, Qwest will seek the fees and costs it incurs in being forced to file the motion. Please let us know by Monday next week, January 31, 2011 if you will voluntarily withdraw these claims.

Very respectfully,

## CERTIFICATE OF SERVICE

I, Paul Lundberg, hereby certify that I have this 22nd day of February, 2011, caused a copy of the following **Petition for Reconsideration or Clarification of** Aventure Communication Technology, L.L.C. to be delivered via electronic mail, hand delivery or U.S. Mail, to the following persons:

Marlene Dortch (by Hand Delivery)  
Secretary  
Federal Communications Commission  
445-12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

James F. Bendernagel, Jr. (by Hand Delivery)  
David L. Lawson  
Michael J. Hunseder  
Brendan McMurrer  
Sidley & Austin LLP  
1501 K Street, N.W.  
Washington, D.C. 20005

Alex Starr (by Hand Delivery)  
Deputy Chief  
Market Disputes Resolution Division  
Enforcement Bureau  
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Washington, D.C. 20554

/s/ Paul Lundberg /s/